American Diamond Tool, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Cases 3–CA–15592, 3–CA–15596, and 3–CA–15601

February 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The central question raised by the General Counsel's exceptions in this case[1] is whether the judge correctly found that, on January 18, 1990, the Union waived its right to bargain about layoffs. Based on this finding, the judge concluded that the Respondent had no backpay liability beyond January 18 for unlawful unilateral layoffs on January 2 and that the Respondent did not further violate Section 8(a)(5) of the Act by unilateral layoffs on February 5.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions, as further explained below, and to adopt the recommended Order.

The Union was certified as the Respondent's employees' collective-bargaining representative on December 20, 1989. On January 2, 1990,[3] the Respondent laid off its three least-senior unit employees for economic reasons. One of the laid-off employees almost immediately accepted a transfer to a nonunit job. The Respondent did not inform the Union of the layoffs or of the transfer. Union negotiating committee member Robert Kosikowski learned about the layoffs from fellow employees on about January 2, and he informed the Union's chief negotiator about them.

On January 18, the Union and the Respondent held their first negotiating session. The Union had not previously raised any objection to the January 2 layoffs, and it did not specifically mention the matter at the meeting. The Union did submit its written contract proposals on January 18. Included in the proposals was a management-rights clause which specifically provided that the Respondent would have the unilateral right to lay off employees by inverse seniority.

On January 25, the Respondent submitted its counterproposals, which included tentative acceptance of the Union's proposed management-rights clause. On February 5, the Respondent laid off two more employees by inverse seniority for economic reasons. The Respondent again did not give the Union notice of the layoffs. Kosikowski, however, learned of the layoffs at the time they occurred and told the Union's chief negotiator about them. Neither layoff was discussed at the bargaining session held on February 5 or at any of the next six or seven bargaining sessions. On February 13, the Union filed an unfair labor practice charge concerning the layoffs. The Union first requested bargaining over the layoffs on April 24. By that time, the laid-off employees had already been recalled.

The judge found that the Respondent violated Section 8(a)(5) by unilaterally laying off three employees and by subsequently transferring one of them to a nonunit job on January 2.[4] He concluded, however, that the Union's subsequent conduct waived its right to bargain about layoffs from and after January 18. We agree.

To be effective, a waiver of statutory bargaining rights must be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). ''Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.'' *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). In this case, where the parties had not yet concluded their first collective-bargaining agreement, we must decide the waiver issue based solely on evidence of the parties' conduct.

Several factors combine to support a finding of waiver. First, the Union had actual notice of the Respondent's unilateral layoffs shortly after they took place on January 2. Second, the Union had an opportunity to object to these layoffs and to the possibility of future unilateral layoffs at the parties' initial bargaining session on January 18 and in numerous subsequent bargaining sessions. Third, the Respondent engaged in good-faith bargaining and there is no evidence that it would not have bargained about layoffs. Indeed, the parties did bargain on this subject. The Union itself proposed at the January 18 bargaining session a management-rights provision which, if implemented as part of a complete contract, would have permitted the Respondent unilaterally to lay off employees by inverse seniority. On January 25, Respondent tentatively accepted the proposal. Finally, in light of this good-faith bargaining, we would not conclude that the unilateral changes of January 2 necessarily tainted the bargaining.

[1] On October 5, 1990, Administrative Law Judge Wallace H. Nations issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1990, unless otherwise stated.

[4] The Respondent does not contest this finding. The General Counsel does not except, inter alia, to the judge's finding that neither the January 2 layoffs nor the February 5 layoffs violated Sec. 8(a)(3).

We need not decide whether any of the foregoing factors, standing alone, would prove a waiver by conduct of the Union's bargaining right. Collectively, they present a situation in which the Union had an opportunity to request bargaining about unilateral layoffs by the Respondent, failed without excuse to do so, and expressly signaled its willingness to permit such conduct in the future. This conduct amounts to waiver.[5] Particularly in the context of initial collective bargaining, where parties have no contract, past practice, or established relationships to guide them, it was incumbent on the Union to take more affirmative action in order to preserve its right to protest unilateral layoffs by the Respondent. In our view, the Union could not accept such unilateral conduct without challenge at the bargaining table and thereafter seek to assert a bargaining right merely by the filing of an unfair labor practice charge.[6]

We emphasize the limits of our holding here. We address only the implications of the Union's unequivocal conduct with respect to the Respondent's unilateral layoffs in January and February. We do not find that the Union was bound to agree to a waiver of the right to bargain about layoffs in any complete collective-bargaining agreement reached by the parties. It was free to change its position in subsequent negotiations, and it apparently did so on April 24. From January 18 until April 24, however, the Union's conduct clearly indicated that it would not object to unilateral economic layoffs by the Respondent.

Our dissenting colleague stresses the absence of notice prior to the layoff of January 2. We agree that the absence of such notice is an important fact. Indeed, based primarily on that fact, we have found the layoff to be unlawful. However, the issue is whether the Union, after learning of the layoff, subsequently led the Respondent to believe that the Union did not object thereto. As to this issue, we note that the Union did not request bargaining to rescind the layoff until April 24, almost 4 months after the layoff. In the interim, on January 18, the Union made a proposal which actually agreed with the type of action taken by the Respondent. The dissent correctly notes that impasse was not reached on January 18. However, the point is that the Union's position on January 18, and its failure to request bargaining to rescind the January 2 layoff, clearly led the Respondent to believe that the Union was not seeking to bargain to rescind the layoff. Accordingly, we affirm the judge's finding of waiver and adopt his recommendations to toll backpay for the unlawful January 2 layoffs as of January 18 and to dismiss the complaint allegation that the February 5 layoffs violated Section 8(a)(5) of the Act.

[5] See, e.g., *Associated Milk Producers*, 300 NLRB 561 (1990); *Ventura County Star-Free Press*, 279 NLRB 412, 420 (1986); *Continental Telephone Co.*, 274 NLRB 1452, 1453 (1985).

[6] *Associated Milk Producers*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Diamond Tool, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER DEVANEY, dissenting in part.

While I agree with my colleagues that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off three of its employees and subsequently transferring one of them to a nonunit position on January 2, 1990, without providing the Union timely notice of its decision,[1] I disagree with their conclusion that the Union waived its right to bargain over these layoffs as well as the subsequent layoff of two employees on February 5, through its ''failure'' to request bargaining. I note that at all times relevant the Union was the certified collective-bargaining representative of the Respondent's employees and that it is undisputed that the Respondent neither provided notice to nor bargained with the Union prior to its implementation of the layoffs.

Before any such implementation of layoffs, the Board requires prior notice ''so that the union may have a reasonable opportunity to evaluate the proposal and present a counterproposal before the change takes place.''[2] In the absence of notice prior to implementation, a union is excused from an obligation to request bargaining over the decision on the ground that it would be futile to request bargaining over a fait accompli.[3] Thus, when a union learns of an employer's decision regarding a mandatory subject of bargaining after its implementation, the Board will not find that

[1] The Respondent does not contest this finding.

[2] *San Antonio Portland Cement Co.*, 277 NLRB 309, 313 (1985).

[3] *Insulating Fabricators*, 144 NLRB 1325, 1331–1333 (1963). In that case, the respondent announced on August 16 to the union representative, Denton, that five employees were due merit increases and that the merit increases would be retroactive to August 13. Denton did not reply. The Board rejected the respondent's argument that it was justified in construing Denton's silence and failure to object as acquiescence on the ground that Denton could reasonably assume that any objection on his part would be futile since the announcement amounted to a statement that the increases had been finally decided and would be put into effect. The Board went on to state that ''[W]hile a union may waive its right to bargain over certain matters, such waiver must be clear and unequivocal. It is not one lightly to be inferred. We find in the circumstances here present no such waiver could reasonably have been inferred by the Respondent from Denton's mere failure to respond to the announcement of merit increases.'' Id. at 1332 (footnote omitted).

union's failure to request bargaining to constitute a clear and unmistakable waiver of its right to bargain.[4]

Contrary to these well-established rules, and in the absence of supporting precedent,[5] the majority here concludes that the Union was not excused from its obligation to request bargaining despite the fact that the Union had no prior notice of the decision and only learned of the layoffs after they were implemented.[6]

In finding waiver, the majority relies on notice to the Union of the layoffs shortly after they occurred; the Union's opportunity to object at subsequent negotiating sessions; and the Respondent's otherwise good-faith bargaining. These factors do not change the reality that the layoffs were presented to the Union as a fait accompli, and the Union had no obligation to request bargaining on them. And, as I would find that the Union was not obligated to request bargaining, I do not agree with the majority that the Union's failure to request bargaining at the first or later bargaining sessions was ''without excuse,'' and that such inaction evidences a clear and unmistakable waiver by the Union of its right to bargain over the layoffs.[7]

Finally, I do not find that the Union's January 18 proposal regarding layoffs made at the commencement of the negotiation process somehow evidences a waiver of its right to bargain over future layoffs. I note that in applying its waiver analysis, the Board distinguishes between occasions when the parties are engaged in negotiations and when they are not.[8] When, as here, the parties are engaged in negotiations, the Board holds that ''an employer's obligation to refrain from unilateral changes . . . encompasses a duty to refrain from implementation *at all*, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.''[9] As the parties had not reached impasse prior to the February 5 layoffs, I do not agree with the majority's finding either that the Respondent was privileged to make this unilateral change during negotiations or that by its proposal the Union ''expressly signaled'' that it would condone such conduct in the future.

Thus, I dissent from the majority's findings that the Union waived its right to bargain over the January 2 and February 5 layoffs. I would find that the Respondent's backpay liability regarding the three employees laid off on January 2 was not tolled on January 18 and that the second layoff of two employees on February 5 constituted an additional 8(a)(5) violation.

[4] *Alpha Biochemical Corp*., 293 NLRB 753 fn. 1 (1989).

[5] *Associated Milk Producers*, 300 NLRB 561 (1990), and *Ventura County Star-Free Press*, 279 NLRB 412 (1986), relied on by the majority, are clearly distinguishable. In those cases, the union received timely notice of the employer's decision prior to implementation. Indeed, those cases emphasize the very proposition that the majority ignores here, that only when a union has received timely notice of an employer's decision can the union's subsequent failure to request bargaining be construed as the waiver of such a right. In *Associated Milk Producers*, supra, for example, the Board stated that ''an employer's obligation, prior to making a change in the terms and conditions of employment, is to give notice of its planned change and afford a reasonable opportunity for bargaining. *If an employer meets its obligation* and the union fails to request bargaining, the union will have waived its right to bargain over the matter in question.'' (Footnote omitted; emphasis added.) *Continental Telephone Co*., 274 NLRB 1452 (1985), relied on by the majority, is also inapposite. In that case, the Board relied on the parties' past practice and the ''Management Prerogatives'' clause of the collective-bargaining agreement to find waiver. In the present case, as the majority points out, the parties have neither a contract nor past practice on which to rely.

[6] Although the majority initially states that the Union had an ''opportunity'' to request bargaining over the January 2 layoffs at the first bargaining session, the majority's later assertion that ''it was incumbent upon the Union to take more affirmative action in order to preserve its rights'' makes clear that in the majority's view the Union was obligated to request bargaining in order to preserve its right to bargain.

[7] The majority finds waiver by in effect finding, for the first time, that when a union learns of layoffs after they occur, it has timely notice of the layoff decision and is obligated to request bargaining over the decision. As to what constitutes timely notice, the Board has stated that ''To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain.'' *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982). Although the Board has refused to state as a general rule how many days prior to implementation notice must be given, it has stated unequivocally that same-day notice is ''insufficient.'' See *Williamette Tug & Barge Co*., 300 NLRB 282 (1990). The Respondent did not even satisfy this standard.

[8] See *Bottom Line Enterprises*, 302 NLRB 373 (1991).

[9] Id. (footnote omitted; emphasis in original).

Michael Cooperman, Esq. and *Mary Thomas Scott, Esq*., for the General Counsel.

Martin F. Idzik, Esq., of Jamestown, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. Based on charges filed by United Steelworkers of America, AFL–CIO–CLC (Union) on April 20, 23, and 25, 1990,[1] the Regional Director for Region 3 issued a consolidated complaint on June 4, against American Diamond Tool, Inc. (ADT or Respondent). The consolidated complaint alleges that Respondent: (1) violated Section 8(a)(1) of the National Labor Relations Act (Act) by offering to renew an incentive bonus if its employees rejected the Union; (2) violated Section 8(a)(1) and (3) of the Act when it laid off three bargaining unit employees effective January 1, and two additional bargaining unit employees effective February 5; and (3) violated Section 8(a)(1) and (5) of the Act when it unilaterally and without notice to the Union implemented layoffs and a transfer, discontinued the holiday and incentive bonuses, and changed the vacation request policy regarding forfeiture of accrued vacation pay and scheduling of vacations.[2] Respond-

[1] All dates are in 1990 unless otherwise noted.

[2] Par. X(e) of the complaint, alleging unilateral implementation of an attendance and absentee program, was withdrawn at the hearing.

ent denies the commission of any of the alleged unfair labor practices.

Hearing was held in these matters in Buffalo, New York, on July 17 and 18. Briefs were received from the parties on or about August 24. Based on the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent American Diamond Tool, Inc. is a New York corporation with an office and place of business in Buffalo, New York, where it is engaged in the manufacture and sale of grinding wheels and similar abrasive products. The Respondent admitted the jurisdictional allegations of the complaint and I find that it is now, and has been at all times material to this decision, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was admitted, and I find, that the Union is now and has been at all times material to this decision a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues Raised by the Complaint*

The complaint presents the following issues for determination:

1. Did Respondent lay off Gerald Fournier, Kevin Collins, and Hipolito Nunez effective January 2, and Michael Cala and John Gagola effective February 5, because of their protected activity in violation of Section 8(a)(1) and (3) of the Act?[3]

2. Did Respondent unlawfully transfer Gerald Fournier to a nonunit position on January 2 in violation of Section 8(a)(1) and (3) of the Act?

3. Did Respondent unlawfully fail and refuse to pay a holiday bonus in December 1989?

4. Did Respondent promise its employees a bonus if they rejected the Union as their bargaining representative?

5. Did the Respondent on or about March 29, unlawfully suspend approving vacation requests for its employees and begin refusing to pay accrued vacation time to discharged employees and employees who quit without 2 weeks' notice?

6. Did the Respondent have an obligation to bargain with the Union concerning the actions set forth in paragraphs 1 through 4 and 5, above, and did it take those actions unlawfully in each instance without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain with regard to those actions and the effects of those actions?

B. *Were the Layoffs and Transfer Unlawfully Motivated?*

On October 16, 1989, the Union presented Respondent with a demand for recognition which Respondent denied. Thereafter, the Union engaged in an organizing campaign. Certain conduct formed the basis for a complaint which was issued on December 29, 1989, alleging coercive preelection conduct in violation of Section 8(a)(1) of the Act. With respect to this complaint, the parties entered into, and the Regional Director approved, a settlement agreement on January 29. General Counsel introduced certain evidence regarding allegations in this complaint not to establish the unfair labor practices it alleged, but to prove unlawful motivation behind the layoffs and transfer involved in the instant complaint.

An election was held on December 7, 1989. Thirty five employees were eligible to vote in the election, a majority of whom selected the Union to be their collective-bargaining representative. The Union was certified as the collective-bargaining representative on December 20.[4] Prior to the election, the Respondent conducted an active campaign against the Union. Its position with respect to the Union is perhaps best set forth in General Counsel's Exhibit 9, a series of letters sent by Respondent to its employees. Inter alia, the letters stress the Company's opposition to the Union, that unions cause strikes, layoffs, shutdowns, bankruptcies, hiring of replacement workers, and other negative actions. One of the letters urged the employees to give Joe Romanowski, a new management member, a chance to work with the employees. Prior to the election, Romanowski held one on one meetings with the unit employees wherein he interrogated the employees about their union sympathies. Management also held meetings with employees wherein the possibility of layoffs was noted.

Thomas Gagola testified about these meetings. Gagola had been employed by Respondent as a molder, a unit position, for about 1-1/2 years at the date of hearing. He is a member of the Union's negotiating committee and has been engaged in bargaining since March 1990. He testified that shortly after the Union made a demand for recognition, he had a conversation with one of Respondent's supervisors, Richard Cook. According to Gagola, Cook said, ''You might as well forget about all the privileges you guys used to have.'' ''From now on there's no more parking in front of the building.'' He also said that Respondent was going to start getting rid of some of the work; and the only reason why the em-

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Further, because of a lack of evidence, General Counsel is no longer alleging a violation of the Act with respect to that portion of par. X(a) of the complaint with regard to the incentive pay bonus.

[3] The date of recall or refusal to accept of these employees is as follows:

Gerald Fournier	January 2	recalled and transferred to a nonunit position
Hipolito Nunez	April 9	recalled
John Gagola	February 26	recalled
Michael Cala	February 26	recalled
Kevin Collins	April	phone calls commenced in April for recall, employee not reached by date of hearing

[4] The appropriate unit is described as follows:

All full-time and regular part-time molding department employees, finishing department employees, maintenance department employees, and carbon room employees employed by Respondent at its Arthur Street, Buffalo, New York facility; excluding all office clerical employees, managerial employees, hot press metal bond pilot project employees, quality control employees, store clerks, guards and supervisors as defined in the Act.

ployees were doing some work at that time was to keep them working. Cook said these changes were going to take place because of the Union.

Later that day, Gagola had a conversation with Respondent's then plant manager, Tom Tower. According to Gagola, Tower told him that if the Union gets in, that Respondent's president was either going to close the business or move it to Mexico. Tower also said that the only reason Respondent had so many employees working was to keep them employed. ''That he'll lay off up to 20 people or whatever he needs just to keep it running.'' These were the only conversations that he had with Tower and Cook about the Union. At the hearing, Respondent took the position that Tower had been demoted and suspended for engaging in antiunion conduct beyond the bounds set by a consultant hired by the Company to conduct its campaign against the Union.

About 4 days before the election, Respondent's president Joe Cower met with his employees. According to Gagola, he said that unions bring layoffs, closed plants, and unemployment. He spoke from notes and used a chart. Cower said, ''You guys might be screwing up a good thing. . . . you guys should be getting a bonus because it was the best two months that we ever had.'' Gagola testified that Romanowski then spoke and said to the employees ''that unions usually shut down places.''

Hipolito Nunez, a former unit employee, testified that near the end of October 1989, he attended a meeting of several employees held by Foreman Joe Nenoff. Nenoff told the assembled employees that he had been involved with a union for about 40 years, that they were no good, they only bring trouble, and that the employees could get fired, laid off, and the plant could close down. Nenoff had only been working for Respondent for about a month at the time of this meeting.

He testified about a meeting conducted by Romanowski and Cower, wherein, speaking from notes, Cower said the Union would be dreadful because other companies will not buy from a union shop. He urged the employees to consider their decision because existing company incentives would allow employees to become millionaires by the time they reached the age of 62. He indicated these incentives would be dropped if the Union came in. He also said that if the Union came in there would be firings and layoffs.[5]

Nunez was laid off in January. He arrived at work the last workday in December 1989 and was told by a fellow employee that he was being laid off. Shortly after, he saw Tom Phelan who told him the next day would be his last as he was laid off. On Nunez' request, he gave him a note indicating Nunez was laid off for economic reasons. Nunez was recalled on April 9 and returned to work in the same job he had been laid off from. He was subsequently terminated for cause, a matter not involved in this proceeding.

On the same date Nunez was laid off, fellow unit members Kevin Collins and Gerald Fournier were also laid off. One of these persons, Fournier, was almost immediately offered employment in a nonunit job in a new, so-called ''pilot project'' and he accepted the offer.[6] On February 5, 1990, two other unit employees, Michael Cala and John Gagola were laid off.

In *Wright Line*, 251 NLRB 1083 (1980), the Board held that on a prima facie showing that an employee's protected conduct was a motivating factor in an employer's decision to engage in discriminatory conduct, a violation of the Act is established, unless the employer shows that it would have taken the same action for legitimate reasons even absent the employee's protected activities. Evidence of hostility or animus, together with the discriminatory conduct occurring near in time to the protected activity have been found to establish a prima facie showing sufficient to support the inference that the unlawful motivation was a factor in the decision. *Corrugated Partitions West*, 275 NLRB 894 (1985); *Gatliff Business Products*, 276 NLRB 543 (1985); *A. G. Boone Co*., 285 NLRB 1070 (1987); *Lakepark Industries*, 293 NLRB 452 (1989).

General Counsel asserts that the employees engaged in protected activity by electing the Union to represent them and the resulting layoffs were retaliatory. Certainly, Respondent's preelection conduct as set out above supports this position. ADT made its union opposition clear, threatened that unions cause layoffs, and then had the first group layoff in its history about 4 weeks after the election.[7] I believe the evidence presented by General Counsel is sufficient to find that a prima facie case of discriminatory activity by Respondent has been established. However, I believe that Respondent satisfactorily satisfied its burden under *Wright Line*, supra, and proved that it would have laid off the involved employees even in the absence of protected activity.

It is Respondent's position that the layoffs were solely effected for economic reasons. Both General Counsel and Respondent offer figures reflecting ADT's financial performance for relevant periods, and there are only slight differences in the figures cited by each. Appendix I to the brief of General Counsel is a thorough representation of relevant quarterly financial data of ADT for the period July–Sept. 1988 to Jan.–Mar. 1990. As pertinent, the appendix reflects the following net profit or (loss) information:

July/Sept. 88	$1,675
Oct./Dec. 88	33,363
Jan./Mar. 89	(35,288)
Apr./June 89	14,088
July/Sept. 89	(116,335)
Oct./Dec. 89	(43,691)

[5] At the hearing, General Counsel amended the complaint to allege that this threat to terminate the existing incentive plan if the Union was selected is a violation of Sec. 8(a)(1) of the Act. I would agree that the statement is violative of the Act if it actually was made. I cannot find from the evidence that it was. Cower did not admit making the statement, and employee witnesses Tom Gagola, Daniel Greishaw, and Bob Kosikowski testified about this meeting without corroborating the testimony of Nunez in this regard. The statement is also contradictory with the entire thrust of the meeting as described by the other witnesses. I do not credit the testimony of Nunez in this regard and thus do not find a violation of the Act.

[6] For purposes of this discussion of whether Respondent's actions were discriminatorily motivated, Fournier's ''transfer or re-employment'' will be addressed in the context of the layoff. I find no independent evidence of discriminatory motive behind the ''transfer'' or ''reemployment'' of Fournier.

[7] Respondent had evidently laid off employees on an individual basis at various times in its past. However, there had never before been a layoff of more than one employee at one time for economic reasons.

Jan./Mar. 90	57,011

Respondent's fiscal year begins July 1 and ends June 30. Until the fiscal year ending June 30, 1990, the Company had not experienced an unprofitable year. The fiscal year ending June 30, 1989, had not been a good year in that net income had only been $14,297. Following the large losses in the first quarter of the 1990 fiscal year, Cower considered a number of ways to cut costs, including effecting employee layoffs. He was advised not to lay off unit employees because of the possibility of being accused of unfair labor practices. However, he did lay off some sales and clerical employees and eliminated entirely some sales and other nonbargaining unit positions at that time. Following the election, with the month of December being in his words, ''a disaster profit-wise,'' Respondent laid off three unit employees and transferred one of these employees to a nonunit position. In February, two other unit employees were laid off. The effect of the unit and nonunit layoffs and position eliminations appear to have resulted in a definite improvement in the Company's performance based on the net profit figures for the third quarter (Jan.–Mar.) 1990. Following two quarters reflecting substantial losses, the Company posted a substantial profit. The laid-off employees were recalled at about this time.

Although General Counsel correctly points out that the Company had not effected layoffs in the past, even though it had experienced a losing or weak quarter, the first two quarters of 1990 do appear to be the worst experienced by the Company for any period for which financial data was introduced in evidence. Moreover, the Company laid off and permanently eliminated nonunit employees, an action which I believe strongly supports its economic necessity argument. The unit employees laid off were the most junior from the standpoint of seniority. They were not shown to be leaders of the union activity or even perceived to be union activists. The timing of the layoff also supports the Company's position. The first layoffs were at the end of December, when the Company could judge what the Company's December performance had been, described as ''disastrous.'' Although it is also close to the time of the election, it was not immediate. The February layoffs were even further removed from the date of the election and some further reductions in nonunit employees were shown to have also occurred in late winter or early spring 1990. Additionally, the timing of the recall of the laid-off employees, immediately following a financial rebound by the Company is more support for its position. The one employee transferred and/or offered employment in the Respondent's nonunit pilot program was offered reinstatement to his former unit position in April and declined the offer.

In conclusion, I find that Respondent had demonstrated that the layoffs and transfer alleged to be discriminatorily motivated were in fact caused by legitimate business reasons and do not constitute violations of the Act.

C. *Did Respondent Violate the Act by Failing to Notify the Union of the Layoffs and Transfer and by Failing to Bargain with the Union Over the Decision to Effect the Layoffs and Transfer?*

On December 27, 1989, the Union sent a letter to Respondent requesting bargaining. Respondent offered to meet with the Union on proposed dates in mid-January. The Union and Respondent met for the purposes of negotiating terms and conditions of employment for the first time on January 18, at which time the Union submitted its written proposal. As noted earlier, three unit employees were laid off effective January 2, 1990, and one of these employees had been transferred to and/or offered reemployment in a nonunit position on the same date. No notice of these layoffs and transfer was given to the Union. Similarly, no notice was given to the Union of the Company's layoff of two more unit employees on February 5.

However, union negotiating committee member Robert Kosikowski testified that he knew of the January layoffs on the date they occurred and informed the then chief union negotiator, Joseph Benbenek, about them at about the approximate time they occurred. The same was true with respect to the February layoffs, except Kosikowski told the new union negotiator, James Bickhart, who had replaced Benbenek. On January 25, the Company gave the Union its counterproposals. Whether this was in a formal meeting or otherwise is unclear in the record. The next certain meeting was held February 5, and was followed by four meetings in March and meetings in April beginning April 16. The matter of the layoffs was not raised at the January 18 meeting, at the February 5 meeting, or at any of the six or seven subsequent meetings held until the laid-off employees had been recalled.

Among the Union's proposals of January 18, was a management-rights clause which stated that the Company had the right to lay off employees and that any layoff would be effected in order of inverse seniority. The Company's counterproposals, dated January 25, purported to accept this union offer. Although there is no real argument that the parties are in agreement with respect to these involved clauses in the proposed contract, the Union takes the position that no part of the proposed collective-bargaining agreement is final and may not be implemented until the entire agreement is final and ratified. The Company takes the position that it and the Union are bound by portions of the proposed agreement when a particular portion is agreed on.

The Company seems to have complied with changes in past practice when an agreement is reached with the Union which dictates such change. The Union suggested at the hearing that if the Company's position was correct, then it could process grievances under the agreed-on grievance procedure. The Company seemed willing to accept such grievances, though the Union had not attempted to file a grievance by the date of hearing. In any event, though it seems unusual for the Union and General Counsel to assert that Respondent should not abide by a newly agreed on practice, I view the parties apparent agreement on the matter of layoffs to bear more on the question of waiver than an actual enforceable agreement.

On February 13, following the February 5 layoff of John Gagola, his brother Tom, as a member of the negotiating committee, filed an unfair labor practice charge on behalf of the Union alleging that this layoff as well as the others, was unlawful. Union Negotiator Benbenek denied any knowledge of the layoffs while he was involved in negotiations. Union Negotiator Bickhart denied any such knowledge until the meeting of April 16, when he testified that he learned of the layoffs from Gagola. I do not credit either denial. Kosikowski testified very credibly that he had given both negotiators this information at about the time the layoffs oc-

curred. Gagola was credibly shown to have attended at least the bargaining session of March 8, a date after he filed the involved unfair labor practice charge. Certainly he would have discussed the matter with Bickhart at this meeting. Gagola's testimony on the question of knowledge was also less than clear. He testified that he knew about the layoffs in January and believed that he filed ''right away when they did it because they never laid off before.'' He also testified that ''every two weeks they were laying people off'' commencing in January. This testimony obviously does not comport with the facts.

The Company's chief negotiator, Thomas Phelan, testified that the first time the Union requested bargaining over the matter of the layoffs and transfer was in a phone conversation on April 24, a date also after the affected employees had already been recalled. Although Bickhart indicated that the matter was raised in bargaining session held April 16 and 18, I do not credit his testimony.[8] He admits the telephone conversation of April 24 and at one point in his testimony stated that the charge over the layoffs was filed after he learned of the layoffs. The charge he refers to was filed April 25. I consider all Bickhart's testimony to be extremely evasive and lacking in candor. Therefore to the extent that his testimony conflicts with that of other witnesses, especially witnesses Phelan and Kosikowski, I credit their testimony over his.

General Counsel argues that according to *Lapeer Foundry & Machine*, 289 NLRB 952 (1988), an employer's decision to lay off bargaining unit employees for economic reasons is a mandatory subject of bargaining, and therefore, it must provide notice to and bargain with the union concerning the decision to lay off bargaining unit employees as well as the effects of that decision.[9] As was the case in *Lapeer*, the decision to effect the layoffs by Respondent was because of economic difficulties and was designed to reduce labor costs. I agree with the General Counsel that Respondent was obligated to notify the Union of its intent to lay off the unit employees prior to laying them off on January 2 and to bargain on request over the decision. The Respondent has not shown that its financial predicament was so dire that implementation of the layoffs could not await notice and bargaining.

On the other hand, I find that its obligation in this regard was waived by the Union after January 18. In *Lapeer*, 289 NLRB at 954, the Board states:

> In light of the economic circumstances motivating a company's decision to lay off employees, however, we will require that negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation.

The Union had effective knowledge of the January layoffs at about the time they occurred. However, no request was made to bargain over the layoff issue at the January 18 meeting or at any subsequent meeting before the laid-off employees were recalled. Moreover, at the meeting on January 18, the Union proposed that the matter of layoffs be a matter of management prerogative and proposed a layoff procedure that mirrored the procedure the Company followed in both the January and February layoffs.

General Counsel argues that the Union did not at any time waive its right to request bargaining as its knowledge of the layoffs was gained after the fact and a request to bargain over the layoff decision would have been futile and unnecessary. In speaking to a related matter in *Lapeer*, supra at 954, the Board stated:

> Moreover, the employer's duty to bargain will require meaningful negotiations concerning the decision to lay off, and not merely the notification to the Union of a decision that is a fait accompli. To ensure meaningful negotiations, we will continue to scrutinize the ''totality of the [parties'] conduct throughout the course of bargaining.''

In the instant case, I cannot find that failure to give notice of the intent to lay off made a request to bargain over the matter after it gained knowledge futile or unnecessary. The first bargaining session occurred only 2 weeks after the first layoffs and about 3 weeks before the second. If there was an alternate solution to the Company's financial problems at the time, I believe the Company would have been willing to explore such a solution. Unlike the situation in *Lapeer*, where there was no ongoing bargaining and indeed the Board found it necessary to issue a bargaining order, ADT and the Union began bargaining on the Union's request in a timely and meaningful manner. By the time of the hearing, the parties had met approximately 15 times. The parties had only introduced economic negotiations in the latest two sessions. Contract negotiations continue and most of the noneconomic issues between the parties have been resolved. There does not appear to be any evidence of less than good-faith bargaining on the part of the Company in these negotiations.

Further, at the first bargaining session, the Company made its financial records available to the Union which had them analyzed. The Union's auditors concluded by March 15 that the Company was not financially healthy. Looking at the totality of the negotiations as described in this record indicates that a request to negotiate over the matter of layoffs would not have been futile, if the request had been made before recall and the matter becoming moot. It appears however, from the Union's proposals of January 18 and its continued silence at the bargaining table on the matter of layoff, that it either had no interest in the matter or had no alternative suggestions to make. In this regard I again note that the January 18 meeting occurred well before the February 5 layoffs. Had the Union raised the matter, it could have bargained over this decision and conceivably over the possibility to rescinding the earlier layoffs. The Union did demand bargaining over the transfer of Fournier to a nonunit position and the Com-

[8] The matter of Fournier was raised at these meetings, with Gagola objecting that Fournier wanted to return to his unit job. Respondent offered Fournier that opportunity and he declined, preferring to stay with the pilot project. Thus, the Company did bargain with the Union on this matter and agreed to give Fournier his choice. As I find below, the Company was obligated to give the Union notice of Fournier's layoff and subsequent reemployment in a nonunit position. It was also obligated to bargain over this matter.

[9] I believe that the matter of the transfer or reemployment of Fournier would also be encompassed within the reasoning of *Lapeer*. The transfer results in the loss of a unit position, either temporarily or permanently. Therefore, I view the Respondent's and the Union's obligations as the same regarding the layoffs and the transfer within the circumstances of this case.

pany did bargain, offering to reinstate him to his former unit position if he so desired.

In conclusion, I find that by having knowledge of the January layoffs and February and failing to request bargaining over the issue in a timely manner, the Union waived its right to bargain after January 18 until it asserted it desire to bargain on April 24. Of course, one could construe the Union's proposal to make the matter of layoffs a matter of management right and the Company's acceptance of the offer to be bargaining over the issue. In either event, I believe the same result should occur. To effectuate the policies of the Act, I will recommend that Respondent make whole the unit employees that it laid off on January 2 for any losses they suffered by virtue of the layoff until January 18, when I find the Union waived its right to bargain over the matter by not requesting bargaining. Because the Respondent could not have anticipated the Union's proposal to make layoffs a matter of management rights prior to January 18, it cannot say in hindsight that the proposal was justification for failing to give notice of its intention to lay off unit employees.

However, after the January 18 meeting, when the Union offered a proposal to make layoffs a matter of management prerogative coupled with no complaint being voiced by the Union about the January 2 layoffs, I believe that Respondent was justified in continuing the January layoffs and effecting the February layoffs without further need for notice. Until the Union's waiver on the matter of layoffs, Respondent was acting in violation of Section 8(a)(1) and (5) of the Act.

D. *Did Respondent Unlawfully Change its Vacation Request and Vacation Pay Policies?*

1. Vacation requests

Most of Respondent's unit employees are entitled to 1 week of vacation per year, with a few more senior employees entitled to 2 weeks' vacation. The Company's past practice dictated that employees give their supervisor the dates they wanted vacation early in the year and the supervisor would attempt to comply with the employee's request, if possible. ADT's company manual, which predates any union activity, provides with respect to vacations:

> To avoid inefficiencies, vacations in each department will be scheduled by each supervisor. Each supervisor along with payroll will have a copy of this schedule. In case of a disagreement, employees with the most seniority will have the first choice.

On March 27, Phelan sent to James Bickhart the following letter:

> Dear Jim:
>
> I want to give each employee the following letter and wanted to let you see it first.
>
> TO: All Employees
> FROM: Tom Phelan
> SUBJECT: 1990 Vacations
>
> Due to a very high absentee rate and a possible summer vacation shut down no further vacations will be granted.
>
> As soon as these issues are resolved we will resume standard vacation planning.
>
> Also, we are making an addition to the Company Policy Manual regarding vacation pay. It is as follows: ''If an employee is discharged for cause, any accrued vacation will be forfeited.'' End of Letter.
>
> Please call me to discuss this as soon as possible.
>
> Signed: Thomas Phelan

Bickhart testified that he responded to this letter by calling Phelan and telling him that the Union did not agree with the change and it had to be negotiated. At the next two negotiating sessions, the matter was discussed. Bickhart was not positive about whether an agreement was reached, although he stated ''I know we have something on the vacation policy.'' This is an important question as there is nothing wrong with the Company proposing a change in vacation policy and offering to bargain over the change, which is what it did. The Company violates the Act only if it implements the proposed change before impasse or agreement. The parties clearly did reach agreement on the proposed change.

The Company wanted to effect a change in vacation scheduling as part of a plan to have a weeklong plant shutdown during the week of July 4, a time when many of its customers also have plant shutdowns. Maintenance and repair to equipment would be accomplished during this time. Bargaining over this matter occurred at the April negotiation sessions, and in a June 13 session, the parties finally agreed to the shutdown and the procedures to be followed in effecting the shutdown. These procedures included employees taking a week of vacation during the shutdown. There is no allegation that the agreed-on shutdown violates the Act. Thus, the only question is, did the Company actually implement the proposal before agreement?

The only evidence supporting General Counsel's contention that the change was implemented prior to agreement is a statement by Phelan that he denied two vacation requests at some point in April. It is not clear to me that these requests were denied pursuant to the proposed change, because of an agreement with the Union or for other reasons. The only person actually identified who was denied vacation time on request was Daniel Greishaw. Greishaw testified that in April, he requested permission to take his week vacation as soon as possible. Phelan denied the request telling Greishaw that at that time he needed molders and just could not afford to have Greishaw, a molder, take time off.

Further evidence that the proposal was not implemented before agreement is the fact that at least three identified employees were granted permission to take vacation after the proposal was made and before the July shutdown.

I also find interesting the fact that the charge underlying this complaint allegation was filed on April 19, a time when the parties were clearly engaged in bargaining over the matter. Moreover, Bickhart was asked the following question, ''After you renewed your demands to bargain on the issue, has the company since then informed you that it intended to deny requests, vacation requests, of any employees?'' He answered, ''Not to my knowledge.'' Considering all the evidence, I do not find that the Company unilaterally implemented its proposed change in vacation scheduling absent

agreement of the Union and did not violate the Act in this regard, as alleged in the complaint.

2. Payment of accrued vacation on termination

The complaint also alleges that the Company proposed by its letter of March 27 a change in its policy concerning payment of accrued vacation to terminated employees and those giving less than 2 weeks' notice, and implemented the proposal without the approval of the Union. With respect to this matter, the company manual provides: ''Vacation pay in lieu of vacation will only be possible if approved by the President of the Company.'' Phelan testified that, from at least June 1989, when he became employed by the Company, the existing practice was to pay accrued vacation pay to employees when they quit only if they gave 2 weeks' notice and to pay no accrued vacation pay if they were discharged for cause. He testified that this policy was consistently applied both before and after the Union's organizing of the Company.

Prior to the Union's organizing efforts, the Company had a problem with the New York State Department of Labor in regard to application of the policy to a discharged employee named Warren Champagne. The state agency ordered the Company to pay Champagne his accrued vacation because the conditions of forfeiture were not specifically spelled out in the company manual. Subsequently, on December 8, 1989, the agency wrote a letter to ADT suggesting that it ''clearly state under what conditions an employee forfeits the benefit.''

The Company's contract proposals given to the Union on January 25 include provisions for paying accrued vacation pay to employees only if they give 2 weeks' notice and are not terminated for cause. Bickhart, on March 22, agreed to the Company's contract proposal, which mirrors the Company's past practice.

I find that alleged change in vacation policy was in fact a past practice, predating the Union's presence, was shown to have been followed, was encompassed within the general language of the company manual, and was bargained over and approved by the Union on March 22. The sole purpose behind rewording the company manual in this regard was in to response the state agency's request, and did not constitute a change in policy. I do not find a violation of the Act by the Company's actions in this regard.

E. *Did the Company Violate the Act by Failing to Give Notice to the Union and Bargain over its Decision Not to Pay the 1989 Christmas Bonus?*

Respondent had a practice of paying a $100 Christmas bonus to each of its employees (unit, nonunit, and managerial) and it unilaterally and without notice to the Union decided not to pay the bonus for 1989. Although the complaint alleges, inter alia, that this decision was discriminatorily motivated, that position is not urged by General Counsel on brief. Indeed the Respondent offered credible evidence that its cash flow situation in December 1989 precluded the payment of the bonus. Its accountant testified that had the bonus been paid to the 60 employees entitled to it, the Company could not have paid its next regular payroll.

General Counsel urges, however, that the Company did violate the Act by failure to give notice to the Union of the decision and thereafter bargain over the decision. Knowledge of the nonpayment of the bonus must be attributed to the Union as Kosikowski was one of the negotiating members at the first meeting of the parties on January 18 and he was informed that the payment would not be made. The evidence over the matter of whether bargaining occurred on this issue is equivocal. Benbenek, the Union's chief negotiator on January 18 and February 5 was asked, ''Do you recall any discussions regarding the Christmas bonus?'' He answered, ''Yes, I think there was. I'm not sure if it was in the proposals or what have you. If it was in the proposals it was discussed in generalities, one of the two. The Christmas bonus, turkey, thanksgiving, possibly the attendance, et cetera, or what have you. I think the company had a so-called, not a wish list but they proposed that they could no longer afford to continue these benefits.'' Benbenek was then asked, ''Did the company inform you at that time that they intended not to distribute the Christmas bonus for 1989?'' Benbenek answered, ''I don't recall.''

Kosikowski, who was in attendance at the January 18 meeting, was asked, ''Has the company in negotiations, ever discussed the incentive bonus or the Christmas bonus, that you can recall?'' He answered, ''Not really. We've been staying away from monetary issues, really. We basically just got wording out of the way up until now.''

It appears to me from the foregoing evidence that the parties were aware of the nonpayment, discussed the matter of the Christmas bonus at the first bargaining sessions and postponed bargaining over it until a later point in negotiations. Unlike the decision to lay off employees which could have been held until negotiations began, I believe that Respondent's cash flow problem had to be addressed immediately. That it did not pay the bonus on the date normally paid does not make subsequent negotiations over restoring the payment futile. The parties were at the date of the hearing just beginning to address economic issues, including the matter of the Christmas bonus. This delay in addressing the economic issues was the joint decision of the parties. Under the circumstances, I do not find that there has been a failure to negotiate over the decision not to pay the bonus and therefore do not find a violation of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent, American Diamond Tool, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. Since December 20, 1989, the Union has been certified as the exclusive representative for purposes of collective bargaining of Respondent's employees in the following appropriate unit:

> All full-time and regular part-time molding department employees, finishing department employees, maintenance department employees, and carbon room employees employed by Respondent at its Arthur Street, Buffalo, New York facility; excluding all office clerical employees, managerial employees, mix room employees, packing and shipping employees, hot press metal bond pilot project employees, quality control employ-

ees, store clerks, guards and supervisors as defined in the Act.

4. By unilaterally laying off three of its employees in the above-described unit and transferring one of these employees to a nonunit position on or about January 2, 1990, without providing the Union with notice and opportunity to bargain about the decision to lay off and transfer employees, and the effects of that decision, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By its actions on and after January 18, 1990, and continuing until April 24, 1990, the Union has waived its right to bargain further over the decision and effects of Respondent's layoff of unit employees on January 2 and February 5, 1990. The Union did request to bargain over the transfer of an employee to a nonunit position and Respondent complied with the request.

6. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not commit any of the other unfair labor practices alleged in the involved complaint.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it is recommended that it be ordered to cease and desist therefrom and take the following affirmative action deemed necessary to effectuate the policies of the Act.

Having found that Respondent unilaterally and unlawfully laid off its employees Gerald Fournier,[10] Kevin Collins, and Hipolito Nunez effective January 2, 1990, and thereafter unlawfully maintained them in layoff status until the Union's waiver of its right to bargain over their layoff on January 18, 1990, it is recommended that Respondent be ordered to make these employees whole for any losses they may have suffered by their unlawful layoff from January 2 until January 18, 1990, to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, American Diamond Tool, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Absent an agreement with the Union embodied in a collective-bargaining agreement, unilaterally laying off employees without providing the Union with notice and opportunity to bargain about the decision to lay off employees and the effects of that decision.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Gerald Fournier, Hipolito Nunez, and Kevin Collins whole for any losses they may have suffered by their unlawful layoff from January 2 until January 18, 1990, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Buffalo, New York facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[10] There is evidence that Fournier did not suffer any loss of earnings by virtue of the layoff as he was reemployed almost immediately in a nonunit position. However, in the event it is found subsequently that he did suffer any loss between January 2 and 18, 1990, he is entitled to recover such losses.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, absent an agreement with the United Steelworkers of America, AFL–CIO–CLC embodied in a collective-bargaining agreement, unilaterally lay off our employees without providing the Union with notice and opportunity to bargain about the decision to lay off employees and the effects of that decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employee in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Gerald Fournier, Hipolito Nunez, and Kevin Collins whole for any losses they may have suffered by their unlawful layoff from January 2 until January 18, 1990, with interest.

AMERICAN DIAMOND TOOL, INC.